Supreme Court, U.S.
FILED
JUL 7 1997
OFFICE OF THE CLERK

(2)

No. 96-1930

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CLARK GAREN,
Petitioner,

v.

SUPREME COURT OF WASHINGTON,
WASHINGTON STATE BAR ASSOCIATION,
Respondents.

On Petition for Writ of Certiorari to the Washington Supreme Court

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BRIEF IN OPPOSITION

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

30 pp

QUESTIONS PRESENTED

1. Whether denial of an application for admission to the Washington state bar for failure to carry applicant's burden of proof to establish that he is of good moral character; for lack of candor in discussing issues; and for lack of concern regarding problems raised in applicant's unsuccessful application for admission to the Nevada state bar; raises a substantial question regarding the applicant's rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution?

2. Whether a bare allegation that Washington applies different standards to evaluate the moral character and fitness of different bar applicants is sufficient to establish a violation of the Fourteenth Amendment to the United States Constitution?

3. Whether a finding that an applicant for admission to the bar in Washington has not established that he is of good moral character violates an applicant's rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution unless it is based on a finding of conduct by the applicant that would constitute either a felony, a serious misdemeanor, or a criminal act?

4. Whether a bar admission proceeding which provides for notice, hearing, presentation of witnesses, and appeal violates guarantees of procedural due process under the Fifth and Fourteenth Amendments to the United States Constitution?

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BRIEF IN OPPOSITION

JURISDICTION

This Court does not have jurisdiction over this matter pursuant to 28 U.S.C. 1254(1) because it does not involve a case in the courts of appeals as required by that section.

STATEMENT OF THE CASE

A. Procedural History of the Case

Petitioner first sat for the Winter, 1994, Washington bar examination, which he failed. He took the Winter, 1995 bar examination. After that exam, it was learned that Petitioner was awaiting a decision from the Nevada Committee on Moral Character and Fitness on his application for admission in that state. His Washington bar examination results were not released to him pending an investigation of the circumstances leading to the Nevada

proceeding. On October 5, 1995, the Nevada Supreme Court denied Petitioner's admission. He filed a writ of certiorari with the United States Supreme Court which was denied.

A hearing before the Character and Fitness Committee of the Washington State Bar Association was held on March 30, 1996. In advance of the hearing, Petitioner was provided with a memorandum from bar counsel to the Committee which discussed the issues of concern regarding Petitioner's moral character and fitness to practice law. On July 22, 1996, the Character and Fitness Committee entered an opinion recommending that Petitioner not be admitted to the practice of law in Washington. A copy of that opinion is at Appendix A.

The reasons stated for this recommendation include that Petitioner failed to carry his burden of establishing that he is of good moral character as required by Washington Admission to Practice Rule 3(a); that problems raised in Petitioner's unsuccessful application for admission to the State Bar of Nevada "seem not to concern [Petitioner], although the committee feels that they are very serious indications of the applicant's character"; that Petitioner's "lack of candor makes the committee somewhat apprehensive"; that Petitioner's "lack of candor" regarding an issue of tax liens "indicate his disregard and disrespect for the lawful process"; and that his handling of other matters "further exacerbate the committee's doubts."

Petitioner appealed from that recommendation to the Board of Governors of the Washington State Bar Association. On October 4, 1996, the Board of Governors affirmed the recommendation of the Character and Fitness Committee.

Petitioner filed a Petition for Review of that decision with the Supreme Court of Washington. On March 6, 1997, the Supreme Court entered an order denying the petition for review. On May 20, 1997, a dissent was filed by one of the nine Justices of the Washington Supreme Court, joined in by one additional Justice.

B. Statement of Relevant Facts

The facts relevant to this bar admissions proceeding are set out in the Memorandum dated January 24, 1996, attached as Appendix B.

REASONS FOR DENYING THE PETITION

I. Petitioner has failed to properly invoke the jurisdiction of this Court.

Petitioner cites 28 U.S.C. 1254(1) as the basis for jurisdiction of this Court to consider this petition. That section provides for appeal from "cases in the courts of appeal." This appeal is from a case in the Supreme Court of Washington. Petitioner should properly have invoked jurisdiction pursuant to 28 U.S.C. 1275(a).

In addition, although not controlling, Petitioner cites no decision of the state court which has decided an important federal question in a way which conflicts with any other court decision, nor an important question of federal law that has not, but should be, settled by this court. Supreme Court Rule 10.

II. Denial of an application for admission to the Washington state bar for failure to carry applicant's burden to establish that he is of good moral character; for lack of candor in discussing issues; and for lack of concern regarding problems raised in applicant's unsuccessful application for admission to the Nevada state bar; does not raise a substantial question regarding the applicant's rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

Petitioner bases his assertion that his Fourteenth Amendment due process and equal protection rights have been violated essentially on the dissent in this 7 to 2 decision of the Washington Supreme Court. However, other than citing this disent, he asserts no facts nor legal authority to support his position.

For purposes of meeting due process requirements, the issue is whether the Supreme Court of Washington on the record presented could reasonably find that Petitioner had not shown good moral character. *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752 (1957). Here, there is no question but that the record supports the Committee's and the Supreme Court's decision. The basis for finding that Petitioner had not met his burden of establishing good moral character was, first, his lack of concern for the very problems which led to Petitioner's unsuccessful application for admission to the Nevada Bar. In addition, the Committee found that Petitioner's lack of candor about his tax liens indicate his disrespect for the lawful process. Those findings are well grounded in the record and clearly form a reasonable basis to find that "Petitioner had not shown good moral character."

Neither Petitioner nor the dissenting opinion of the Washington Supreme Court on which he relies presents any argument or authority for the proposition that Petitioner's equal protection rights have been violated.

III. A bare allegation that Washington applies different standards to evaluate the moral character and fitness of different bar applicants is not sufficient to establish a violation of the Fourteenth Amendment to the United States Constitution.

Petitioner argues that the fact that the Washington Supreme Court has previously admitted seven bar applicants who had been convicted of criminal offenses demonstrates that that Court applied different standards in evaluating those applicants and in evaluating Petitioner's application.

To the contrary, the Washington Supreme Court applies the same standards for evaluating every bar applicant. Those standards are:

> (1) the nature and character of the prior misconduct; (2) the sufficiency of the punishment undergone in connection therewith, and the making or

> failure to make restitution where required; (3) the applicant's attitude, conduct, and reformation subsequent to the prior misconduct; (4) his current proficiency in the law; and (5) the sincerity, frankness, and truthfulness of the applicant in presenting and discussing the factors relating to his prior misconduct and present admission.

In re Belsher, 102 Wn.2d 844, 852, 689 P.2d 1078 (1984). As the Washington Supreme Court has stated in a reinstatement after disbarment case as a "threshold consideration":*

> The major consideration in reinstatement proceedings is whether the disbarred attorney has overcome those weaknesses which produced the earlier misconduct. . . . No attorney who has failed to overcome those weaknesses that produced the conduct for which he or she was disbarred is fit for reinstatement.

In re Hart, 118 Wn.2d 280, 822 P.2d 294 (1992).

Thus, while the "the nature and character of the prior misconduct" is *one* factor to be considered in evaluating the moral character of a bar applicant, the applicant's *current* moral character is the issue in an admission proceeding.

Those standards were applied by the Character and Fitness Committee in making their recommendation, and it is Petitioner's failure to carry his burden pursuant to those standards which resulted in that recommendation. Petitioner has not shown that those standards were applied differently in any other case. The fact that in dissenting from the majority decision in this case, two members of the Washington Supreme Court were of the opinion that Petitioner had met his burden is not a basis for asserting a lack of due process or equal protection.

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* [I]t is entirely appropriate for us to look to reinstatement cases for guidance in determining whether [a bar applicant] has met his burden of demonstrating good moral character." *Belsher*, at 851.

> From a profession charged with such responsibilities there must be exactly those qualities of truth-seeking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as "moral character."

Schware v. Board of Bar Examiners, supra, at 247 (Frankfurter, concurring).

IV. A finding that an applicant for admission to the bar in Washington has not established that he is of good moral character which is not based on a finding of conduct by the applicant that would constitute either a felony, a serious misdemeanor, or a criminal act does not violate an applicant's rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

As Petitioner notes, this Court has rejected a prior challenge to the requirement that an applicant for the bar be of good moral character. *Law Students Civil Rights Research Council, Inc. v. Wadmon,* 401 U.S. 154, 91 S.Ct. 720, 27 L.Ed.2d 749 (1971). Only where it can be shown that the state has acted arbitrarily or discriminatorily can a Petitioner establish that his due process and equal protecion rights have been violated.

> A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualication must have a rational connection with the applicant's fitness or capacity to practice law. . . . Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory.

Schware v. Board of Bar Examiners, supra, at 239.

Other than chastising this Court for its earlier refusal to accept Petitioner's Petition for Writ of Certiorari from

the Nevada Supreme Court's denial of Petitioner's admission to that bar, Petitioner has cited no facts or authority to support any argument that a bar applicant may not be denied admission to practice unless "based on a finding of conduct by the applicant that would constitute either a felony, a serious misdemeanor, or a criminal act."

V. A bar admission proceeding which provides for notice, hearing, presentation of witnesses, and appeal does not violate guarantees of procedural due process under the Fifth and Fourteenth Amendments to the United States Constitution.

Petitioner argues that his due process rights were violated by "questioning your Petitioner about numerous issues without notice." He does not cite what those issues were.

In fact, two weeks prior to the hearing before the Character and Fitness Committee, Petitioner was provided a copy of a memorandum from the General Counsel of the Washington State Bar Association to the Character and Fitness Committee. A copy of that memorandum is at Appendix B. That memorandum set out every issue on which Petitioner was questioned by the Committee. Petitioner had *actual* notice of every single issue which was later of concern to the Committee and which is discussed in the Committee's opinion.

CONCLUSION

Petitioner disagrees with the decision of the Character and Fitness Committee of the Washington State Bar Association to deny his admission to the bar. That decision was affirmed by the Board of Governors of the Washington State Bar Association and by seven of the nine members of the Washington Supreme Court.

One of the dissenters, being dissatisfied with the basis for the majority decision to deny Petitioner's admission, speculates that the real reason for that decision was "per-

sonal . . . dislike." Petitioner baldly states that he was "denied admision because they didn't like his personality." However, neither the dissent nor Petitioner cite anything in the record which even remotely suports this impugnment of the motives of the members of the Character and Fitness Committee, the members of the Board of Governors, and the seven majority members of the Washington Supreme Court.

Petitioner has not demonstrated that his Fourteenth Amendment rights of due process and equal protection have been violated. His petition should be denied.

DATED this 7th day of July, 1997.

Respectfully submitted,

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